

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPIRE BUCKET, INC.,

Plaintiff,

v.

CONTRACTOR CARGO COMPANY,

Defendant.

OPINION AND ORDER

12-cv-233-wmc

On October 7, 2011, plaintiff Empire Bucket, Inc. (“Empire”) agreed to construct and ship a specialized truck deck to defendant Contractor Cargo Company (“CCC”). After delivering the deck, Empire initiated this action to recover the unpaid remainder of the purchase price. In answer, CCC has alleged that the deck is flawed and will not perform to specifications. In addition to denying that it owes Empire the rest of the purchase price, CCC has asserted three counterclaims sounding in contract law, along with a fourth claim under tort law for “fraud, fraudulent inducement [and] intentional misrepresentations.” (Amended Answer, dkt. #11, at 11.) Now before the court is Empire’s motion to strike the fraud/misrepresentation counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a legally cognizable claim, or pursuant to Rule 9(b) for failure to plead the claim with adequate particularity. The court will grant Empire’s motion to dismiss on the first ground as Wisconsin’s economic loss doctrine bars defendant’s tort counterclaim.

OPINION

The parties agree that Wisconsin law governs this contract. Their disagreement centers on whether the Wisconsin economic loss doctrine applies to defendant's fourth counterclaim.

The economic loss doctrine bars tort recovery for purely economic losses suffered by the buyer of a defective product. *Wausau Title, Inc. v. Cnty Concrete Corp.*, 226 Wis. 2d 235, 246, 593 N.W.2d 445, 451 (1999). "Economic loss" is defined as "damages for inadequate value, cost of repair and replacement of the defective product, or consequent loss of profits -- without any claim of personal injury or damage to other property." *State Farm Mut. Auto Ins. Co. v. Form Motor Co.*, 225 Wis. 2d 305, 314, 592 N.W.2d 201, 205 (1999).

On its face, this doctrine would seem to preclude defendant's tort claim for fraud and intentional misrepresentation, which arises solely out of allegations that the truck deck is defective, but the doctrine remains riddled with exceptions, including an exception for certain fraudulent inducement and intentional misrepresentation claims. To invoke the fraud-in-the-inducement exception under Wisconsin law:

. . . a plaintiff must show that: (1) there was an intentional misrepresentation . . .; (2) the misrepresentation occurred before the contract was formed; and (3) "the fraud [was] extraneous to, rather than interwoven with, the contract." Or stated another way, the fraud concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract.

Kaloti Enter., Inc. v. Kellogg Sales Co., 2005 WI 111 ¶42, 283 Wis. 2d 555, 585, 699 N.W.2d 205, 219 (internal citations omitted).

Defendant's fraudulent inducement counterclaim fails under the third prong of the test articulated in *Kaloti*, because the fraud alleged is "interwoven" with the subject matter of the contract. Defendant's counterclaim alleges plaintiff made "misrepresentations to CCC . . . that [Empire] could perform its duties under the subject contract properly and in a timely manner. These misrepresentations included statements that Empire could build and deliver the Deck so that it met certain technical specifications." (Amended Answer, dkt. #11, at ¶¶ 30-31.) However uncertain application of the third prong in *Kaloti* may be in other settings, with the subject matter of this contract there is no meaningful distinction between the plaintiff's representation -- that the seller *had the ability to* timely supply goods of a certain quality -- and the promise that every seller makes when agreeing to produce goods on order. Indeed, the promise to supply goods implicitly contains (or is "interwoven" with, in the parlance of *Kaloti*) a representation that the seller has the ability to do so, and the risk that the seller will not perform as expected is one which every buyer appreciates is a risk that can and should be dealt with as part of the contracting process. See *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 989 (7th Cir. 2005) ("[T]he fraud in the inducement exception to the economic loss doctrine . . . does not apply when the fraud pertains to the character and quality of the goods that are the subject matter of the contract." (citing *Tietsworth v. Harley Davidson, Inc.*, 270 Wis. 2d 146, 164-65, 677 N.W.2d 233, 243-44 (2004))). Because the narrow exception for extraneous fraud is inapplicable here, the economic loss doctrine bars defendant's tort counterclaim.

Finding adequate grounds to dismiss pursuant to Rule 12(b)(6), the court does not reach plaintiff's alternative argument that the claim is insufficiently pled under Federal Rule of Civil Procedure 9(b).

ORDER

IT IS ORDERED that plaintiff's motion to dismiss defendant's fourth counterclaim (dkt. #14) is GRANTED.

Entered this 13th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge